Filed 5/9/19 P. v. Davis CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DWAIN EVERETT DAVIS, Defendant and Appellant.	A153670 (San Mateo County Super. Ct. No. SC043066A)

After being sentenced to a prison term of 25 years to life under the Three Strikes law, defendant Dwain Davis filed a petition for resentencing under Proposition 36, passed by the voters in November of 2012. The trial court denied that first petition, concluding that Davis was ineligible for resentencing because he posed an unreasonable risk of danger to public safety. Davis appealed and, while his appeal was still pending, filed a second petition for resentencing, arguing that the standard for assessing whether he posed an unreasonable risk of danger to public safety had been changed by the passage of Proposition 47 in November of 2014. After we affirmed the trial court's denial of his first petition, the trial court denied his second petition and request for a hearing, concluding that the resentencing provision of Proposition 36 permitted him to file only one such petition. Davis again appealed. We affirm.

BACKGROUND

In 1998, a jury found Davis guilty of possession of a firearm by a felon (former Pen. Code, § 12021, subd. (a)(1).) At sentencing, the trial court found true allegations that Davis had two previous convictions for armed robbery, and sentenced him to a prison term of 25 years to life under the Three Strikes law (§ 667, subds. (b)-(i); see also § 1170.12.)[1]. On July 7, 2000, this court affirmed.[2] (*People v. Davis* (July 7, 2000, A086052) [nonpub. opn.].)

On November 6, 2012, California voters passed Proposition 36, which enacted the Three Strikes Reform Act of 2012, effective November 7, 2012. Proposition 36 amended the Three Strikes law to authorize 25 year to life terms only where the defendant's third "strike" is a serious or violent felony. (See § 667, subd. (e)(2)(C); *People v. Johnson* (2015) 61 Cal.4th 674, 679–681.) Proposition 36 also enacted section 1170.126, which provides a procedure for petitioners currently serving a 25 year to life term for a non-serious and non-violent felony conviction to request resentencing. (§ 1170.126, subds. (a)-(f).) In particular, section 1170.126, subdivision (b) provides that a petitioner "may file a petition for a recall of sentence, within two years after the effective date of the act that added this section or at a later date upon a showing of good cause, before the trial court that entered the judgment of conviction in his or her case, to request resentencing in accordance with the provisions of subdivision (e) of Section 667, and subdivision (c) of Section 1170.12, as those statutes have been amended by the act that added this section."

Once a petitioner has met certain eligibility requirements for resentencing under section 1170.126, subdivision (e), the petitioner "shall be resentenced . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).) In exercising this discretion, the court "may consider: (1) The petitioner's criminal conviction history,

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[1] All statutory references are to the Penal Code.

[2] The Attorney General's request that we take judicial notice of the record in Davis's appeal from his conviction (A086052) is granted.

including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes; (2) The petitioner's disciplinary record and record of rehabilitation while incarcerated; and (3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety." (§ 1170.126, subd. (g).)

On January 25, 2013, Davis filed a petition for recall of sentence pursuant to section 1170.126. A hearing was held at which the trial court found that Davis met the eligibility requirements for resentencing and heard two days of testimony from Davis and his brother on the issue of whether such resentencing would pose an unreasonable risk of danger to public safety. The trial court concluded that it would, and accordingly denied the petition on June 27, 2013. Davis appealed. (*People v. Davis* (Feb. 26, 2015, A139111) [nonpub. opn.].)

While that first appeal was pending, on November 4, 2014, California voters passed Proposition 47, which converted many nonviolent offenses from felonies to misdemeanors. As relevant here, Proposition 47 enacted section 1170.18, subdivision (c), which provides: "As used throughout this Code, 'unreasonable risk of danger to public safety' means an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667." The cited clause enumerates eight felonies or classes of felonies.

The next day, November 5, Davis filed a second petition for recall of sentence, arguing that Proposition 47 had changed the definition of "unreasonable risk of danger to public safety" under the resentencing provision of Proposition 36 such that it no longer applied to him.

On February 25, 2015, this court affirmed the denial of Davis's first petition for recall of sentence.[3] (*People v. Davis* (Feb. 26, 2015, A139111) [nonpub. opn.].) Our

[3] We granted Davis's unopposed motion to take judicial notice of the record in his first appeal (A139111).

Supreme Court granted review and held disposition of the case until it resolved the question of whether Proposition 47's new definition of "unreasonable risk of danger to public safety" applied to petitions to recall sentence under Proposition 36 in *People v. Valencia* (2017) 3 Cal.5th 347 (*Valencia*), ultimately concluding that it did not. (*Id*. at pp. 373–377.) Following *Valencia*, our Supreme Court dismissed review, and this court issued a remittitur on November 22, 2017.

On January 19, 2018, the trial court held a hearing on Davis's second petition. At the hearing, Davis's counsel stated that following *Valencia*, Davis was no longer seeking to have a different standard applied to the determination of whether he posed an unreasonable risk of danger to public safety, but that there were changed factual circumstances relevant to the dangerousness determination.[4] The trial court found that Davis was not entitled to file a second petition under section 1170.126, subdivision (b), and on that basis, denied the petition:

"THE COURT: All right. As [defense counsel] points out, the first petition decided by Judge Mallach was filed February 14, 2013. The second one was filed November 5, 2014. And I do believe that the issue is whether or not the defendant is entitled to file a subsequent petition.

"I'm going to find that he is not. He had his one hearing, which I think is all that he's entitled to under [section] 1170.12[, subdivision] (c). It was a full hearing. It was Judge Mallach's determination after a couple of days of testimony that resentencing posed an unreasonable risk of danger to public safety.

[4] On November 16, 2018, Davis requested that we take judicial notice of three documents dating from 2016–2018 regarding his behavior in prison. Because these exhibits were not before the trial court and are not relevant to our resolution of this appeal, the request is denied.

"I'm going to find that he is not entitled to a second hearing but only the one.

"And, on that basis, I'm going to deny the petition, the subsequent petition, and deny the request for a—an additional hearing."[5]

On February 9, Davis filed this timely appeal.

DISCUSSION

In construing statutes adopted by the voters, we apply the same principles of interpretation we apply to statutes enacted by the Legislature. (*People v. Park* (2013) 56 Cal.4th 782, 796.) " 'The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law.' " (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276 (quoting *People v. Pieters* (1991) 52 Cal.3d 894, 898–899).) "Thus, 'we turn first to the language of the statute, giving the words their ordinary meaning.' (*People v. Birkett* (1999) 21 Cal.4th 226, 231.) The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme. (*Horwich*, *supra*, 21 Cal.4th at p. 276.) When the language is ambiguous, 'we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet.' (*Birkett*, *supra*, 21 Cal.4th at p. 243.)" (*People v. Rizo* (2000) 22 Cal.4th 681, 685; see *People v. Park*, *supra*, at p. 796.)

As noted, section 1170.126, subdivision (b) provides that a petitioner "may file a petition for a recall of sentence, within two years after the effective date of the act that added this section or at a later date upon a showing of good cause."

The Attorney General reads the language "a petition" to limit a petitioner to a single petition. We agree that this language is more naturally read this way, but it is not

[5] This ruling was followed by a written order on January 23, signed by the presiding criminal judge. For reasons that are not clear from the record, the written order refers to Davis's "motion for modification of sentence under Prop-57," characterizing it as a request for reconsideration: "To the extent that Defendant requests reconsideration or rehearing of his motion for resentencing pursuant to Proposition 57, the Court declines to exercise its discretion to reconsider its earlier order of denial. The Court believes it fully addressed the Proposition 57 issue raised by the Defendant."

entirely dispositive, particularly in light of section 7, which provides that throughout the Penal Code, "the singular number includes the plural, and the plural the singular." (See *Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 464–465 [assuming that such a statute applies to grammatical articles]; *Moustafa v. Bd. of Registered Nursing* (2018) 29 Cal.App.5th 1119, 1131 [such a statute "at the very least reflects a legislative intent to discourage rigid interpretations of singular usages"].) We thus conclude that the statutory language is ambiguous, and turn to consideration of the statute as a whole and indicia of the voters' intent.

Reading "a petition" in section 1170.26, subdivision (b) to permit only a single petition is more consistent with the balance of that subdivision. As noted, that subdivision requires such a petition to be filed within a two-year window after the effective date of the act (or later only upon a showing of good cause). (§ 1170.26, subd. (b).) This suggests an intent to provide eligible prisoners a single opportunity for resentencing, rather than multiple or ongoing evaluations of whether they pose an unreasonable risk of danger to public safety based on changed circumstances. If the latter were the voters' intention, there would be no reason to limit the timeframe in which such petitions could be filed.

Our reading of section 1170.26 is also consistent with the Legislative Analyst's analysis of Proposition 36, which contemplates only one opportunity for resentencing: "Offenders whose requests for resentencing are denied by the courts would continue to serve out their life terms as they were originally sentenced." (Voter Information Guide, Gen. Elec. (Nov. 6, 2012) analysis of Prop. 36 by Legis. Analyst, p. 50.) And in discussing the Proposition's fiscal effects, the analysis further states that it "would result in a *one-time* cost to the state and counties related to the resentencing provisions of this measure. . . . These costs could be a few million dollars statewide over a couple of years." (*Ibid.* (emphasis added).) This one-time cost is more consistent with a single petition and hearing for each eligible prisoner, not unlimited petitions and hearings throughout the two-year window for filing.

In sum, we conclude that Proposition 47 contemplates a single petition and hearing for petitioners seeking to be resentenced, not multiple such petitions and hearings. Accordingly, the trial court did not err in denying Davis's petition.

DISPOSITION

The order is affirmed.

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Richman, J.

We concur:

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Kline, P. J.

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Stewart, J.

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